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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL N. SHERIDAN and
MARY A. SHERIDAN,
Petitioners,

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the intentional tort exception of the Federal Tort Claims Act bars all suits against the United States alleging negligent failure to prevent a federal employee from committing an intentional tort, including cases in which the injury results from the government's breach of an affirmative duty to protect the public and those where the source of the government's duty to prevent the injury arises independent of its status as the assailant's employer.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Michael N. Sheridan and Mary A. Sheridan hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A *infra*, 1a-19a) is reported at 823 F.2d 820. The opinion of the district court (App. B *infra*, 20a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1987. *See* App. A *infra* at 1a. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, § 1346(b) provides, in pertinent part:

> Subject to the provisions of [28 U.S.C. §§ 2671-2680], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28, United States Code, § 2680 provides, in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violations of Federal law.

STATEMENT

This case arises out of Dr. and Mrs. Sheridan's attempt to recover for the injuries they sustained when, because of the government's negligence, they were fired upon by a Navy enlisted man outside the Naval Medical Center in Bethesda, Maryland. The undisputed facts[1] are as follows:

In February, 1982, Robert W. Carr was a Medical Aide enlisted in the United States Navy and stationed at the Navy Medical Center in Bethesda, Maryland (commonly known as "Bethesda Naval.") He resided in base quarters where he shared a room with another enlisted man. In defiance of Navy regulations which prohibited the possession and storage of firearms in base housing, Mr. Carr maintained a .22 caliber rifle and ammunition in his quarters. Navy regulations not only proscribed such conduct, but as well placed an affirmative obligation on any individual who knew of a violation of such regulations to bring this matter to the attention of the appropriate authorities. Mr. Carr's roommate, also a Navy enlisted man, was aware of Mr. Carr's possession of this contraband, but he remained silent about the weapon and ammunition until the Navy made its investigation into the shooting.

After his assigned shift on February 6, 1982, Mr. Carr began drinking and ultimately became quite inebriated. At some point in the evening, Mr. Carr packed some of his possessions, including the rifle and ammunition, into a bag and left his quarters. Later that evening, three

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[1] This petition arises on appeal of the granting of the government's motion to dismiss; therefore all facts as pleaded by the Sheridans must be accepted as true. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). In any event, all the facts relied upon by the Sheridans were garnered either through discovery or upon examination of the record of the court martial of the enlisted man who shot at them. Accordingly, it is doubtful that the government could contest any of the Sheridans' allegations.

Navy personnel found Mr. Carr lying face down on the concrete floor in a part of the campus known as the "old hospital building." Recognizing that Mr. Carr was inebriated to the point of unconsciousness, they began to escort him to the base emergency room.

Two of the corpsmen carried Mr. Carr while the third carried the bag containing the rifle and ammunition. Mr. Carr was unable to support himself and the corpsmen had a difficult time transporting him to the emergency room. Several times along the way Mr. Carr slipped from their grasp and fell to the floor and, at least on one occasion, Mr. Carr fell head first down a flight of concrete stairs.

Notwithstanding his debilitated condition, Mr. Carr broke free from the two corpsmen supporting him and snatched his bag back from the third. When he grabbed his bag, he revealed the barrel of his rifle. Yet when this happened, none of the corpsmen attempted to restrain or subdue Mr. Carr, forcibly or otherwise. Nor did they attempt to alert base security. Rather they simply fled, apparently without another thought, leaving Mr. Carr to his own devices.

Mr. Carr made his way out of the hospital building and eventually ended up near the public road which fronts the campus of Bethesda Naval. At that point, Mr. Carr began shooting at passing vehicles, including a public transit bus and the vehicle driven by the Sheridans. Mrs. Sheridan was struck both by the bullets and shards of the shattered windshield and she sustained injuries to her face and hands. Dr. Sheridan was not physically injured, but he was traumatized by both the shooting itself and by witnessing his wife's injuries.

After exhausting their administrative remedies, the Sheridans brought suit in the United States District Court for the District of Maryland. The Sheridans claimed that the government had negligently supervised

Mr. Carr, in light of his past displays of psychological instability; that the government was negligent *per se*; and that the government breached a duty of care that arose independent of Mr. Carr's employment status. The government moved to dismiss on the basis of the "intentional tort" exception, 28 U.S.C. § 2680(h). The district court, while "sympathetic" to the Sheridans' plight, App. B *infra* at 26a, granted the government's motion. Over Chief Judge Winter's dissent, the Fourth Circuit affirmed. This petition timely followed.

REASONS FOR GRANTING THE PETITION

This case presents issues of substantial public importance concerning the scope of the Federal Tort Claims Act. More particularly, this case raises questions concerning the amenability of the government to suit in cases where its negligence allows an intentional tort to be committed and in cases where it assumes, and breaches, an independent duty to protect members of the public from harm. The lower courts have reached inconsistent results in deciding these questions, and some courts have dismissed such claims on what they perceive as this Court's guidance in *United States v. Shearer*, 473 U.S. 52 (1985). Review by this Court is warranted to resolve this split in the circuits and to provide guidance to the lower courts in an area which has proved especially susceptible to inconsistent, divergent and often absurd results.

1. Since shortly after the enactment of the Federal Tort Claims Act in 1946 (Act of Aug. 2, 1946, ch. 753, 60 Stat. 842, hereinafter "FTCA" or "the Act"), courts have struggled to delineate the boundaries of the intentional tort exception of the Act. Courts found especially troubling fact patterns involving government negligence which allowed a foreseeable intentional tort to be committed. *See, e.g., Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954); *United States* v. *Shively*, 345 F.2d 294 (5th Cir. 1965). By 1985, however, the lower courts had

sketched the rough contours of law: an action would lie against the government only when the intentional tortfeasor was not a federal employee, *Naisbitt* v. *United States*, 611 F.2d 1350, 1353 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980), or when, if the assailant were a federal employee, the government had assumed a duty to protect the victim independent of its status as the assailant's employer. *Rogers* v. *United States*, 397 F.2d 12, 14 (4th Cir. 1968); *Loritts* v. *United States*, 489 F.Supp. 1030, 1031 (D. Mass. 1980).[2]

In 1985 this Court considered for the first time a case raising the question of whether the government was amenable to suit under the FTCA for "negligent supervision" of its employees. *See United States* v. *Shearer*, 473 U.S. 52 (1985).[3] Yet the Court did not resolve this question in *Shearer*, as only three justices joined Chief Justice Burger's opinion concluding that the "arising out of assault [or] battery" language of § 2680(h) was sufficiently broad as to preclude all claims in which the assailant was a federal employee.[4] Indeed, by focusing on whether "deliberate attacks" by a federal employee were involved, 473 U.S. at 55, *Shearer* blurred the distinctions drawn in *Rogers* and *Loritts* and other cases which had focused on the source of the government's duty, rather than the employment status of the assailant.

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[2] The assailant in *Rogers* was an occasional federal employee. The decision in *Rogers* did not turn on whether the assailant was an employee of the government at the time of the assault, however, but upon the fact that independent of the nature of its association with the assailant, the government breached a duty it had assumed to care for the victim.

[3] This Court has previously determined that a claim of negligent supervision of non-employees was actionable under the FTCA. *United States* v. *Muniz*, 374 U.S. 150 (1963). This Court addressed the intentional tort exception with respect to claims of misrepresentation in *Neustadt* v. *United States*, 366 U.S. 896 (1961) and again in *Block* v. *Neal*, 460 U.S. 289 (1983).

[4] We use "*Shearer*" generally to refer to Part IIA of Chief Justice Burger's opinion, on which the Court was evenly divided.

Since this Court's decision in *Shearer*, the lower courts have evinced uncertainty and confusion in handling questions of government negligence that allows intentional torts to be committed. Some courts have construed this Court's decision in *Shearer* as "a strong signal" and thus dismissed such claims solely because the assailant was a government employee. *See Garcia* v. *United States*, 776 F.2d 116, 118 (5th Cir. 1985); *Satterfield* v. *United States*, 788 F.2d 395, 399 (6th Cir. 1986). Indeed, in *Garcia*, the Fifth Circuit overruled precedent which had allowed such claims to be heard in limited circumstances. *See Underwood* v. *United States*, 356 F.2d 92 (5th Cir. 1968).

Other courts as well have followed Chief Justice Burger's rationale in *Shearer* to preclude suits alleging negligent supervision. A sharply divided panel of the Second Circuit, in *Johnson* v. *United States*, 788 F.2d 845 (2d Cir.), *cert. denied*, 107 S.Ct. 315 (1986), held that the intentional tort exception precluded a suit on behalf of a minor child molested by a mail carrier which alleged that the Postal Service was negligent in assigning a known child molester to her route. In *Miele* v. *United States*, 800 F.2d 50, 52 (2d Cir. 1986), the Second Circuit went further, reading *Shearer* to preclude a claim based upon a "deliberate" attack by a government employee irrespective of whether this attack would have constituted an intentional tort under state law. The Tenth Circuit, in an opinion in which Chief Judge Holloway reluctantly concurred on the basis of binding circuit precedent, has held that the intentional tort exception shields the government where its negligent failure to provide psychiatric treatment to a federal employee allowed that employee to commit a violent assault. *Hoot* v. *United States*, 790 F.2d 836 (10th Cir. 1986). The split opinion of the court below was based in part on *Thigpen* v. *United States*, 800 F.2d 393 (4th Cir. 1986), itself a split decision on the intentional tort ex-

ception analysis. The court below held that under no circumstances will a negligence claim lie against the government if the asserted negligence is permitting a federal employee to commit an intentional tort.

In contrast, three panels of the Ninth Circuit have rejected the reasoning in *Shearer* altogether and have allowed the government to be held liable for negligently failing to prevent an intentional tort from being committed. *See Bennett* v. *United States*, 803 F.2d 1502 (9th Cir. 1986); *Kearney* v. *United States*, 815 F.2d 535 (9th Cir. 1986); *Morrill* v. *United States*, 821 F.2d 1426 (9th Cir. 1987).[5] The Third Circuit in *Shearer* refused to reconsider *in banc* the panel's holding that the intentional tort exception did not bar a claim that the government negligently failed to supervise a serviceman of known violent propensities, 729 F.2d 266 (3d Cir. 1984), and there is no suggestion that the court would disavow that holding now.

The question of whether the government may be held to answer for its negligence in failing to supervise its employees who then commit intentional torts has arisen repeatedly and will continue to arise in courts throughout the country. As Congress did not address this question specifically, either in the statutory language or in the legislative history, courts have arrived at inconsistent results based on irreconcilable analyses. The analysis in *Shearer* has not only split this Court, but as well has sharply divided three of the five circuits which have followed it. Review by this Court is warranted to settle this recurring issue that has split the circuits and many of the panels considering it.

2. The lower courts have reached divergent conclusions not only with respect to "negligent supervision"

[5] The government has filed petitions for rehearing *en banc* in each of these cases. To date, the Ninth Circuit has not acted on any of the petitions.

claims, but also on the narrower question of whether the government can be held accountable for failing to prevent an intentional tort where it has undertaken a special responsibility, apart from its status as employer, to protect the public.

The court below held that the duties the government had assumed by adopting regulations prohibiting possession of firearms on base, and requiring known violations of such regulations to be reported, and the fact that the government's duty to prevent the assault arose wholly apart from the assailant's status as a federal employee, were inapposite. *See also Thigpen*, 800 F.2d at 394 (government's affirmative duty to care for children in a hospital did not bring suit outside the scope of § 2680 (h)). No other court has gone this far and, indeed, every court that has considered these questions has resolved them by refusing to apply the intentional tort exception.

In *Kearney*, 815 F.2d at 537, the Ninth Circuit held that the intentional tort exception did not preclude an action alleging that through negligence, including the violation of applicable regulations, an imprisoned federal employee awaiting trial was allowed to escape and sexually assault and murder a woman. Recognizing that the government's liability would have been unquestioned had the assailant not been a federal employee, *Panella*, 216 F.2d 622; *United States* v. *Muniz*, 374 U.S. 150 (1963), the court could find no principled basis for shielding the government solely because the assailant happened to be a federal employee. The court below, even though it acknowledged that the government would be liable had the person who fired upon the Sheridans been other than a federal employee, App. A *infra* at 4a, nonetheless held that the employment status of the assailant relieved the government of liability.

The Second Circuit has adopted *Shearer's* expansive construction of the intentional tort exception. Significantly, however, in *Johnson*, 788 F.2d 853 n.8, it cited

with approval two district court cases which accord with *Kearney* and which would allow recovery under the facts present here. The court endorsed *Loritts* v. *United States*, 489 F.Supp. 1030, a case in which the government was held to answer for allowing a West Point cadet to assault a visiting woman after the government voluntarily assumed the responsibility for providing escorts for visitors such as herself. Similarly, *Johnson* accepted *DeLong* v. *United States*, 600 F.Supp. 331 (N. Alaska 1984), a case in which the government was held responsible for assaults on civilians by Marine guards who had not been informed that the civilians had authority to be in a restricted area. On October 9, 1987 the Second Circuit heard argument in *Doe* v. *Scott*, 652 F.Supp. 549 (S.D.N.Y. 1987), on the government's interlocutory appeal of a decision holding the intentional tort exception inapplicable to the government's breach of its voluntarily assumed duty to care for children.

Kearney, *Loritts* (which is the only expression on this point in the First Circuit), *DeLong* and *Doe* all stand in conflict with the decision of the court below on the narrower question of whether the intentional tort exception exculpates the government when it breaches a voluntarily-assumed duty, and when it would be liable but for the happenstance that the assailant was a federal employee. This Court recognized in *Block* v. *Neal*, 460 U.S. 289, 297 (1983), that where the government voluntarily undertakes a duty, it is obligated to carry out that duty with due care. The Solicitor General has twice suggested to this Court that the source of the government's duty to supervise the assailant, rather than the assailant's employment status, controls the applicability of § 2680(h). *See Brief for the United States*, at 22 n.5, *United States* v. *Shearer*; *Memorandum of the United States in Opposition* at 4 n.7, *Johnson* v. *United States*. Review by this Court is warranted to harmonize these discordant holdings.

3. This case is an especially appropriate one for plenary review by this Court in that it presents facts which bring into sharp focus the deficiencies of the analysis employed by the courts construing the intentional tort exception broadly to preclude all claims involving assaults committed by federal employees. Particularly with respect to the narrower claim that the government may be held liable where it has an independent duty to prevent the assault, this case presents facts which show that bright lines can be drawn to effectuate Congress' intent to hold the United States liable for its negligence on the same terms as private individuals, while simultaneously protecting the government from artfully pleaded complaints disguising *respondeat superior* claims as claims for government negligence.

There are two factual bases upon which the government's negligence is predicated here which were absent in *Shearer* and *Johnson*. First, the government violated regulations it had implemented to protect individuals such as the Sheridans and thus, under Maryland law, it was negligent *per se*. *See J. Aron & Co., Inc.* v. *Service Transportation Co.*, 486 F.Supp. 1070, 1075-76 (D. Md. 1980). Navy regulations prohibited the storage of weapons on base and required personnel aware of any violation of this regulation to report it to the appropriate authorities. Mr. Carr's storage of the weapon, his roommate's failure to report it and the three corpsmen's failure to alert base authorities that Mr. Carr was roaming the campus with a rifle all violated the Navy's regulations and thus all constituted negligent acts *per se*. Moreover, the injuries sustained by the Sheridans were precisely the injuries the Navy's regulations were designed to prevent.

Where, as here, the government has voluntarily assumed a duty to protect the public by issuing regulations intended to prevent the foreseeable commission of intentional torts, it is responsible for carrying out that duty

with due care. *Block* v. *Neal*, 460 U.S. at 297; *Rogers* v. *United States*, 397 F.2d at 14. If a claim will lie against the government when the breach of an affirmative duty allows a government employee to commit an intentional tort, as the Ninth, and apparently First and Second Circuits hold, then such a claim must lie when the government has spelled out its affirmative obligations in its own regulations. While it may be in some case that a plaintiff will attempt to "semantically recast" a *respondeat superior* claim into a claim of government negligence by asserting some amorphous affirmative duty of the government, this concern is unwarranted where the government's affirmative duty is made explicit by its own regulations. As Chief Judge Winter recognized, focus on the existence of *per se* negligence "provides a bright-line test for the existence of what might otherwise be a nebulous 'affirmative duty' [and] also satisfies concerns about circumvention of § 2680(h) by ensuring that government liability is based on an independent tort, and not on the employment relationship alone." App. A, *infra* at 14a.

The second factual distinction present in this case is that the government conceded that, had the assailant been a private citizen, the intentional tort exception would not apply. Plainly, if the government would be liable had the assailant been a private citizen, the government's liability cannot arise solely because it is the assailant's employer. *Shearer*, 473 U.S. at 57. Here again a bright-line test exists to curtail creative pleadings: if the government would be liable under the same circumstances had the assailant not been a federal employee, then the intentional tort exception does not apply. The focus of such a test is, therefore, not the happenstance of the assailant's employment status, but instead the wrongfulness of the government's conduct.

Chief Judge Winter recognized the irony in exculpating the government solely because it allowed one of its employees to commit an intentional tort: "in an effort to

avoid subjecting the government to suit *just because* of its role as employer, [the analysis] goes to the opposite extreme and offers immunity from suit for precisely the same fortuitous circumstance." App. A *infra* at 13a (emphasis original). *Cf.*, *Block* v. *Neal*, 466 U.S. at 298 ("Any other interpretation would encourage the Government to shield itself completely from tort liability by adding misrepresentations to whatever otherwise actionable torts it commits.") Congress cannot be presumed to have intended this ironic, and indeed absurd, result. Review by this Court is especially appropriate as the particular facts present here demonstrate the inadequacies of determining the applicability of § 2680(h) solely by examining the assailant's employment status.

4. Review is also warranted in this case because the analysis in *Shearer* has proved unworkable and has produced results at odds with Congress' intent. If the United States is to be held to the same standards as a private person, 28 U.S.C. § 2674, then there can be no basis for wholesale exclusion of "negligent supervision" claims.

The conclusion reached in *Shearer* and in the court below that the intentional tort exception in § 2680(h) bars all claims of negligent supervision of a government employee is inconsistent with the language and purposes of that provision. Section 2680(h) bars claims against the government "arising out of assault [or] battery." The type of negligent supervision claim in this case, however, does not fall within this bar, as it does not "arise out of" the intentional tort of assault or battery. The Sheridans have alleged that the government was on notice of the threat Mr. Carr presented to others, from his past displays of psychological instability. The government's failure to prevent the resulting foreseeable harm gives rise to a distinct claim. The fortuity that the resulting injury may also give rise to a claim for assault and battery neither adds to nor detracts from the negligence claim. *See, e.g.*, *Beattie* v. *United States*, 756 F.2d 91, 125 n.17 (D.C. Cir. 1984) (Scalia, J., dissenting)

(noting that an intervening intentional or criminal act does not break the chain of causation if it is within the scope of the risk created by the negligence). Review by this Court is warranted to guide the courts to an analysis of such claims that is consistent with the intent of Congress.

Shearer, and courts that have applied it, correctly note that the "arising out of" language contemplates exclusion of more than claims "*for* assault." *Shearer*, 473 U.S. at 55 (emphasis original). *Shearer*, however, expanded the language to cover all claims that "stem from" an intentional assault or battery, if the assailant is a government employee. *Id.* The effect of this interpretation is to equate the immediate cause of the injury with the legal basis of the claim. Thus, any claim which may involve a battery or assault by a federal employee, however tangentially, would be barred. The plain language "arising out of" suggests, however, that the exception focuses upon the genesis of the injury, not its immediate cause. *Shearer*'s interpretation disregards substantive tort law, within which the FTCA and its exceptions must operate. While it may create a simple rule, it hinges liability upon fortuitous circumstances wholly unrelated to Congress' intent.

The legislative history of § 2680, which *Shearer* cites, is sparse and equivocal, and courts have used the same selected statements to support entirely different conclusions as to the scope of the government's liability. *E.g.*, *Sheridan*, 823 F.2d at 827 n.6 (Winter, C.J., dissenting). In interpreting the Act's language, *Shearer* also misapplied the holding of *Neustadt*, 366 U.S. 696. This Court explained the significance of *Neustadt* in *Block* v. *Neal*, 460 U.S. at 298-99, holding that a negligence claim would not be barred by the "misrepresentation" exception to the FTCA, even though the facts of the case would support a common law misrepresentation claim, and the factual and legal questions of the claims would "partial[ly] overlap." *Id.* at 298. *Shearer* does not address *Block*, and applies *Neustadt* inconsistently with *Block*'s limitation.

This Court has previously recognized the government's liability in negligence for failure to supervise. *Muniz*, 374 U.S. at 150. *See also Panella*, 216 F.2d 622, *cited with approval in Shearer*, 473 U.S. at 56. Both *Muniz* and *Panella* involved non-government employees as assailants, but exclusive focus on the employment status of the assailant to determine whether the injury "aris[es] out of" the assault is illogical and inconsistent with the plain language of the statute. Applying *Shearer*, when the government negligently supervises a prisoner, the government will be liable if the prisoner then intentionally injures someone, but only if the assailant is not on the government's payroll. This precise circumstance arose in *Kearney*, yet had the *Shearer* analysis been applied, the government would have been held immune for its own negligence, on facts substantively identical to those that led to government liability in *Muniz*. Congress cannot be deemed to have intended such untenable results. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982).

The Ninth Circuit illustrated the illogic of this result in *Bennett* and *Kearney*, and, rejecting *Shearer*, relied upon traditional tort analysis to determine the scope of the intentional tort exception. Thus, "arising out of" encompasses cases which seek to shift liability for an intentional tort, based solely upon the fortuity of an employment relationship between the assailant and the government. *Kearney*, 815 F.2d at 537; *Bennett*, 803 F.2d at 1503. Preclusion of such *respondeat superior* claims extends the "arising out of" language, within a framework of tort analysis, beyond simply cases "for assault." At the same time, it assauges Chief Justice Burger's legitimate concern that the "semantical recasting of events," *Shearer*, 473 U.S. at 55, will skirt the bar of § 2680(h).

Under the Ninth Circuit's approach, liability is also determined by applying traditional tort principles: an intentional act will only create liability if it was foreseeable and within the supervisory control of the government. *Kearney*, 815 F.2d at 537; *Bennett*, 803 F.2d at 1503. This result is consistent with Congress' intent to provide redress for injuries caused by government negligence, *e.g.*, *Dalehite* v. *United States*, 346 U.S. 15, 24-25 (1953), based upon tort claims determined "in the same manner and to the same extent as [for] a private individual under like circumstances." 28 U.S.C. § 2674. *See Bennett*, 803 F.2d at 1504. *Shearer* and courts that apply it ignore these principles, and make no effort to reconcile the *Shearer* result with the Act's primary requirements. Review by this Court is necessary to ensure that individuals will not suffer from overly restrictive constructions of Congress' waiver of an archaic immunity. *See United States* v. *Aetna Surety Co.*, 338 U.S. 366, 383 (1949).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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October 16, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3961

MICHAEL N. SHERIDAN and MARY A. SHERIDAN,
Appellants,

versus

THE UNITED STATES,
Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Herbert F. Murray, United States District Judge.
(C/A 85-775)

Argued: October 8, 1986 Decided: July 20, 1987

Before: WINTER, Chief Judge, and HALL and SPROUSE, Circuit Judges.

Michael J. Kator (Irving Kator; Kator, Scott & Heller on brief) for appellants; Gary P. Jordon, Assistant U.S. Attorney (Breckenridge L. Willcox, U.S. Attorney on brief) for appellee.

SPROUSE, Circuit Judge:

Michael N. Sheridan and Mary A. Sheridan, his wife, brought this action against the United States alleging

that United States Navy personnel negligently failed to prevent a naval enlisted man from firing a rifle into their automobile, injuring Mrs. Sheridan. The district court dismissed the Sheridans' action, holding that it was barred by provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, as interpreted by this court in *Hughes v. United States*, 662 F.2d 219 (4th Cir. 1981), *aff'g Hughes v. Sullivan*, 514 F. Supp. 667 (E.D. Va. 1980). We affirm.

Robert W. Carr was an enlisted medical aide in the United States Navy stationed at the Bethesda Medical Center in Maryland. On the evening of February 6, 1982, Carr became totally inebriated after consuming a large quantity of wine, rum and other alcoholic beverages. He packed some of his possessions, including a .22 calibre rifle and ammunition, into a uniform bag and left the barracks. Some time later, three naval corpsmen found Carr unconscious on the floor of one of the hospital buildings and attempted to take him to the emergency room. As the corpsmen carried him, Carr slipped several times, falling to the floor and on one occasion down a flight of concrete steps. Before they reached the emergency room, Carr regained consciousness, broke away from the corpsmen, grabbed his uniform bag from one of them, and displayed the barrel of his rifle. The corpsmen fled, taking no further action either to subdue Carr or to alert any other authority that Carr was inebriated and armed. Carr left the building and ended up near the public street in front of the hospital. He began shooting at passing vehicles, hitting the Sheridans' automobile and injuring Mrs. Sheridan.

The Sheridans brought this action under the provisions of the Federal Tort Claims Act, which waives sovereign immunity for certain tort claims against the federal government. Section 2680(h), however, establishes an exception to the waiver providing, among other things, that it does not apply to "[a]ny claim arising out of

assault, battery. . . ." 28 U.S.C. § 2680(h). In *Hughes* we affirmed the district court's dismissal of a claim against the government because it fell within this exception. There, a postal employee, while on his route, lured two young girls into his postal truck and committed sexual indecencies. He had previously pled guilty to a similar offense. The parents of the children brought an action against the government under the Federal Tort Claims Act alleging the postal supervisor was negligent in allowing the employee to remain in a position where he came into contact with young children. The district court, reasoning that the cause of action arose from the intentional act of the employee and not from the negligence of the supervisor, held the claim barred by § 2680(h).

In *Thigpen v. United States*, 800 F.2d 393 (4th Cir. 1986), we again affirmed the district court's dismissal of a claim against the government as barred by § 2680(h). In *Thigpen*, a naval corpsman had committed sexual indecencies with two minor girls while they were hospitalized in a naval hospital. An action was brought on behalf of the children contending that the Navy negligently failed to supervise the offending corpsman. There, too, the district court reasoned that the injury resulted from the intentional tort of the corpsman and not from a lack of supervision by the government.

The Sheridans argue that their case is distinguishable from *Thigpen* and *Hughes*. They contend, first, that the actions of the three naval corpsmen in the present case constituted *per se* negligence because they violated a Navy regulation requiring personnel to report violations of another regulation that prohibits the possession of firearms on base. The Sheridans argue that Congress did not intend to immunize "*per se*" negligence from liability through the intentional tort exception to waiver of immunity, but intended the exception to apply primarily to cases involving government supervision. We find no merit

to the Sheridans' contention that we should establish a principle that would eliminate application of the § 2680 (h) exception when "*per se*" negligence is involved.

The Sheridans also argue that Carr's status as an enlisted naval man and, therefore, a government employee, should be irrelevant to the issue of the government's immunity *vel non* from liability for negligently failing to prevent the injury.[1] They correctly assert that the shooting at the Sheridans' vehicle was not connected with Carr's job responsibility or duties as a government employee. The Sheridans further assert that if Carr had not been a government employee, a claim would undoubtedly lie against the government and § 2680(h) would be inapplicable. *See Rogers v. United States*, 397 F.2d 12 (4th Cir. 1968) (holding § 2680(h) inapplicable where probationer alleged that negligence by United States marshal allowed non-government employee to assault and torture probationer). They contend it is anomalous to deny their claim simply because the corpsmen were negligent in the handling of a government employee rather than a private citizen.[2]

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[1] The dissent asserts that a focus on the employment status of the assailant "opens the door to a range of arguments concerning the 'scope of employment'" while its proposed rule would not. Slip op. 21-22. The proposed rule would not eliminate an inquiry into the "scope of employment," however, it would simply shift it to the employees whose alleged negligence allowed the assault to occur.

[2] The dissent attempts to reconcile this perceived anomaly. It proposes a rule that would allow suits arising out of assaults by government employees so long as the asserted negligence by the government employees is not a failure to supervise the assailant. Such a solution does not reconcile the cases, it simply would create an exception to the princple that § 2680(h) bars suits arising out of assaults by government employees. An "anomoly" would still exist —persons assaulted by a government employee would be treated differently depending on whether they could allege negligence by other government employees that allowed the assault to occur but that did not constitute negligent supervision of the assailant. We prefer to follow established Fourth Circuit precedent and hold the present claim barred by § 2680(h).

As we have stated, § 2680(h) is an exception to the general waiver of sovereign immunity contained in 28 U.S.C. § 1346(b). The § 1346(b) waiver, of course, relates to negligent or wrongful acts or omissions of government employees. In negligent supervision cases a plaintiff's cause of action is directed not at the person who inflicted the injury, but at the government employees who, by failure to supervise, did not prevent the harm. Explicit in *Thigpen*, *Hughes* and similar cases[3] is the principle that § 2680(h) bars actions alleging negligence of the supervising employees when the underlying tort is an assault or battery by a government employee. *Thigpen*, 800 F.2d at 394; *Hughes*, 514 F. Supp. at 670. We see no sufficiently distinguishing difference between the facts of *Thigpen* and *Hughes* and the facts here to justify applying a different rule.

In view of the above, the decision of the district court is affirmed.

AFFIRMED.

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[3] *See Johnson by Johnson v. United States*, 788 F.2d 845, 850 (2d Cir. 1986); *Satterfield v. United States*, 788 F.2d 395, 399 (6th Cir. 1986); *Garcia v. United States*, 776 F.2d 116, 118 (5th Cir. 1985); *Wine v. United States*, 705 F.2d 366, 367 (10th Cir. 1983).

WINTER, Chief Judge, dissenting:

The Federal Tort Claims Act (FTCA) established a scheme under which the Federal Government waives sovereign immunity for suits based on its employees' negligence, but not on their intentional misconduct. Cases which involve conduct that is purely one type or the other are thus easy to resolve. Problems arise when *both* negligent and intentional conduct play a role in producing the resulting injury. Where government negligence leads to intentional misconduct—e.g., an assault and battery—by a private party, the courts generally allow suits against the United States, based on its negligence. Note, "Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee," 69 Geo. L.J. 803, 804 (1981). But where the same government negligence results in an assault and battery by a *federal employee*, the majority opinion in this case holds that the United States is immune from suit by virtue of the intentional tort exception to the FTCA, 28 U.S.C. § 2680(h). In other words, the majority holds that the employment status of the assailant determines when the United States will be liable for its negligent misconduct. I do not think that this result is supported by the language or purpose of the FTCA, or by this court's previous opinions regarding § 2680(h). I think that the government should be held subject to suit in all cases where its alleged liability is independent of the assailant's employment status—i.e., where a court can isolate a government duty and source of negligence that is based on something other than the fortuitous circumstance that the government happens to be the assailant's employer.

There are two lines of decision in this Circuit regarding the § 2680(h) assault and battery exception, neither of which directly addresses the circumstances of this case.

Hughes v. Sullivan, 514 F. Supp. 667 (E.D. Va. 1980), *aff'd sub nom.* Hughes v. United States, 662 F.2d 219 (4 Cir. 1981), involved a postal worker who sexually assaulted two young children. Plaintiffs based their FTCA suit on the theory that the government was negligent in hiring and retaining this employee. Nevertheless, the district court held that § 2680(h) barred the claim because the assailant was a federal employee, while recognizing that the result would differ had the assailant not been employed by the government. 514 F. Supp. at 669-70. We affirmed. Thigpen v. United States, 800 F.2d 393 (4 Cir. 1986), dealt with plaintiff patients who were sexually abused by a corpsman at the Beaufort Naval Hospital. Although plaintiffs premised their FTCA claims on the government's negligence in hiring and supervising the corpsman, we held these claims barred as arising out of assault or battery. *Id.* at 394. We noted that "a different rule may obtain" where the assailant is not a federal employee. *Id.*, n.3.

A different rule did obtain in Rogers v. United States, 397 F.2d 12 (4 Cir. 1968), where a United States marshal allowed plaintiff-probationer to spend the night with an "unsavory" character—not a federal employee—who proceeded to torture the plaintiff. We reversed a summary judgment in the government's favor, ruling that "[w]hen an agency of the United States voluntarily undertakes a task, it can be held to have accepted the duty of performing that task with due care." 397 F.2d at 14. We thus remanded for a determination of the existence and possible breach of such a voluntary assumed duty. Section 2680(h)'s exception for intentional torts was deemed "inapplicable": "if there is a valid claim here, it is founded on negligence even though assault or false imprisonment may be collaterally involved." *Id.* at 15.

I think it illogical to say that the assault and battery claim was only "collaterally involved" in *Rogers* whereas

it was considered the essence of the claim in *Hughes* and *Thigpen* and thus barred by § 2680(h). It simply makes no sense to assert that a negligence claim "arises out of" an assault and battery claim only when the assailant happens to be on the United States payroll. The derivation of an injury or cause of action should not turn on the employment status of the offender. *See* Bennett v. United States, 803 F.2d 1502, 1504 (9 Cir. 1986); 69 Geo. L.J. at 808-09. Rather, the source of a claim depends on the nature of the wrongful behavior in question.

As the majority opinion concedes (*ante* at 5), *Hughes* and *Thigpen*, as well as the other cases relied upon by the majority (*ante* at n.1), are all cases where the purported government negligence was premised solely on claims of negligent hiring and/or supervision. The same was true in United States v. Shearer, 473 U.S. 52, 105 S. Ct. 3039 (1985).[1] Such claims are essentially grounded in the doctrine of respondeat superior. In these cases, the government's liability arises, if at all, *only* because of the employment relationship. If the assailant were not a federal employee, there would be no independent basis for a suit against the government. It is in this situation that an allegation of government negligence can legitimately be seen as an effort to "circumvent" the § 2680(h) bar; it is just this situation—where government liability is possible only because of the fortuity that the assailant happens to receive federal paychecks—that § 2680(h) was designed to preclude. *See Shearer*, 105 S. Ct. at 3042-43; *Hughes*, 514 F. Supp. at 668, 669-70; Panella v. United States, 216 F.2d 622, 624 (2 Cir. 1954).

On the other hand, where government liability is independent of the assailant's employment status, it is pos-

[1] Eight Justices decided the case on *Feres* doctrine grounds. The discussion of § 2680(h) by Chief Justice Burger, joined only by Justices White, Rehnquist and O'Connor, was merely dicta. Justice Powell did not participate.

sible to discern two distinct torts: the intentional tort (assault and battery) and the government negligence that precipitated it. Where no reliance is placed on negligent supervision or respondeat superior principles, the cause of action against the government cannot really be said to "arise out of" the assault and battery; rather it is based on the government's breach of a separate legal duty. Shearer v. United States, 723 F.2d 1102, 1106-08 (3 Cir. 1983), *rev'd on other grounds*, 473 U.S. 52 (1985) ("if an assault and battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA"); Gibson v. United States, 457 F.2d 1391, 1395-97 (3 Cir. 1972) (§ 2680(h) not applicable where intentional misconduct was the foreseeable consequence of government negligence: "Under such circumstances, the attack was not an intervening act and the tort did not arise out of the assault and battery. It had its roots in the Government's negligence"); Loritts v. United States, 489 F. Supp. 1031-32 (D. Mass. 1980) (citing *Gibson* and *Rogers*); 69 Geo. L.J. at 816. Thus, the assertion in *Hughes*, 514 F. Supp. at 668-70, and *Thigpen*, 800 F.2d at 395, that the negligence claim arose out of the assault, is inapposite where the claim against the government is not premised on a theory of negligent supervision or respondeat superior. "Though it may be true that the assault and battery serves to attach consequences to the government's negligence, under traditional tort analysis the negligence remains the legal cause of the plaintiff's injury if the assault and battery by the employee was a foreseeable consequence of that negligence." 69 Geo. L.J. at 808 n.33. *Accord*, *Thigpen*, 800 F.2d at 399 n.10 (Murnaghan, J., concurring) ("The occurrence of the actual assault and battery thus serves only to establish the extent of the plaintiff's injury, not to establish the hospital's breach of duty").

We have used precisely this type of analysis in FTCA cases where the assailant is not a government employee. Thus, in *Rogers*, we invoked traditional tort principles when examining whether the government owed, and breached, a duty to transport and provide subsistence to the plaintiff with due care. The focus of the opinion was the existence of a government duty—not the presence of a subsequent intentional tort. The employment status of the assailant was irrelevant, not because the assailant was a private party, but because we could isolate a government duty and source of negligence that was independent of the government's status as employer, i.e., liability was not based on a claim of negligent supervision.

The principle that I perceive would allow suits against the government when a plaintiff's negligence claim is not based on a theory of negligent supervision or respondeat superior. Several other circuits support this view. *See, e.g.*, Johnson by Johnson v. United States, 788 F.2d 845, 853 n.8 (2d Cir.), *cert. denied* 107 S. Ct. 315 (1986); *Gibson*, 457 F.2d 1391 (3 Cir. 1972); DeLong v. United States, 600 F. Supp. 331 (D. Alaksa 1984); *Loritts*, 489 F. Supp. 1030 (D. Mass. 1980).[2] It is also the basis for the view advocated by the concurring opinion in *Thigpen*: a negligence claim does not "arise out of" assault and battery when based on "the breach of a clear and recognizable affirmative duty. . . ." 800 F.2d at 398 (Murnaghan, J., concurring). Although much of the analysis in that opinion is persuasive, the *Thigpen* majority aptly criticized the proferred standard as overly "elastic" and potentially limitless.

[2] The Ninth Circuit has gone even farther and permitted suits against the government, premised on negligent supervision, as long as the government had notice of the employee's violent tendencies. *Bennett*, 803 F.2d 1502 (9 Cir. 1986). *Accord Shearer*, 723 F.2d 1102 (3 Cir. 1983).

800 F.2d at 395.[3] Indeed, although the concurrence considered *Thigpen* to involve such a clear affirmative duty, the majority there properly recognized that the cause of action was based solely on a claim of negligent supervision, *id.* at 394-95.

The two factors isolated by plaintiffs to disinguish this case from *Hughes*, *Thigpen*, *Shearer*, etc., provide an excellent means for refining the standard advocated by the concurrence in *Thigpen*. I regret to say that the majority opinion in this case summarily dismisses these factors, without any attempt to address the analysis so carefully laid out by the plaintiffs.

A. Irrelevance of employment status

Where, as here, the circumstances of a case are such that the government's negligence would render the United States liable if the assailant were not a federal employee, the fact that the assailant just happens to be federally employed should not be permitted to immunize the United States from suit. The test to be applied is straightforward: would the government be liable if the assailant was not a government employee? If yes, § 2680(h) is not applicable.

There are several advantages to this approach. It satisfies judicial concerns that plaintiffs will circumvent the § 2680(h) bar by simply framing an assault and battery claim in terms of negligence on the part of the government. *See, e.g., Hughes*, 514 F. Supp. at 668;

[3] The *Thigpen* majority also argued that there was no basis in the Act for distinguishing between situations where the government owes an "affirmative duty" and when it does not—all claims "arising out of assault [or] battery" are barred. 800 F.2d at 395-96. This criticism, however, misses the point: the distinguishing factor advocated by the concurrence was intended as a means for determining when a claim can legitimately be said to "arise out of" an assault or battery. This approach is sound, in principle, but requires further refinement, as set out *infra*.

Thigpen, 800 F.2d at 394-95; *Shearer*, 105 S. Ct. at 3042. The government will be subject to suit only in cases where it would be liable for the assault by a private party; i.e., only where government liability is premised on something *other than* the employment relationship. Thus efforts to disguise a respondent superior claim will be precluded. *See Loritts*, 489 F. Supp. at 1031-32 (where government undertakes task of providing escorts to plaintiff and companions, it must perform task with due care; where attack occurred when plaintiff was walking without an escort, "[t]his is not . . . the situation where a plaintiff by virtue of artful pleading seeks to circumvent section 2680(h)").

In addition, this approach will prevent the elevation of form over substance in FTCA litigation. Plaintiffs A & B may suffer the same injury, as the result of the same government negligence. Yet under the government's approach, because of the fortuity that plaintiff A's assailant happened to be a federal employee, A's suit would be barred while B's would not. This situation is particularly troubling since one purpose of the FTCA was to establish a scheme providing uniformity of treatment, unlike the system of private bills that it was replacing. *See* Jayson, 1 Handling Federal Tort Claims: Administrative and Judicial Remedies, § 66.03 (1986).

In this case, had it been a private citizen who took the weapons wrongfully stored in Mr. Carr's room, or had it been a private citizen who the three corpsmen found wandering drunk and brandishing a rifle, the government's liability would be unquestioned. The majority opinion implicitly concedes as much. There is no persuasive reason for the disparate treatment which the government advocates.[4] As explained in *Loritts*, "[t]he

[4] If anything, it makes more sense to hold the government liable for intentional torts of its employees—rather than private parties—over whom it exercises at least some control. *Gibson*, 457 F.2d at 1394; 69 Geo. L. J. at 814 n.63, 821.

Court does not agree that the government can escape liability under section 2680 because of the fortuitous nature of the circumstances following its negligence." 489 F. Supp. at 1032 n.3. *See also Johnson*, 788 F.2d at 853 n.8 ("[t]he negligence alleged . . . [in *Loritts*] was independent of the government's supervision of its employees and the fact that an employee, rather than a non-employee, committed the assault was 'fortuitous'").

In its brief and at oral argument the government acknowledged the irrationality of its interpretation of § 2680(h)—a critical concession in light of the well-established principle that, "whenever possible," statutes should be construed to avoid creating "untenable distinctions and unreasonable results." American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982). Plaintiffs' alternative avoids this anomaly, and properly focuses on the wrongfulness of the government's conduct. The irony in the government's position is that, in an effort to avoid subjecting the government to suit *just because* of its role as employer, it goes to the opposite extreme and offers immunity from suit for precisely the same fortuitous circumstance.

B. Presence of *per se* negligence which leads to precisely the injury that the violated statute or regulation was designed to prevent

Plaintiffs also seek to distinguish cases invoking the intentional tort exception by arguing that they do not, in contrast to the present suit, involve the violation of government regulations—i.e., negligence *per se*. Plaintiffs' brief correctly points out that "*Hughes* does not answer the question of whether Congress intended the government to be free of liability when the injury which arose out of its *per se* negligence was actuated by the foreseeable commission of an intentional tort." The value of this factor in distinguishing the other cases is supported by *Rogers*' pronouncement that voluntary assump-

tion of a task entails the duty to perform it with due care. 397 F.2d at 14. *Accord Loritts*, 489 F. Supp. at 1031. Surely the passage of regulations concerning weapon storage and safety constitutes such a voluntary assumption of duty.

The presence of a *per se* negligence claim effectively answers the criticisms levied at an approach like that of the *Thigpen* concurrence. It provides a bright-line test for the existence of what might otherwise be a nebulous "affirmative duty." It also satisfies concerns about circumvention of § 2680(h) by ensuring that government liability is based on an independent tort, and not on the employment relationship alone. As with the first factor, this one properly focuses attention on the government's negligent conduct, rather than on the fortuity of the assailant's employment status.

Superficially, some of the language in *Hughes*, *Thigpen* and *Shearer* may appear to preclude the approach just outlined. Yet, on closer inspection, the principles announced in those cases are perfectly compatible with, and arguably better served by, the position advocated by plaintiffs.

There are two basic criticisms of plaintiffs' approach that derive from *Hughes*, *Thigpen* and *Shearer*. First, it is contended that the "sweeping language" of § 2680 (h) "excludes any claim *arising out of* assault or battery." *Shearer*, 105 S. Ct. at 3042 (emphasis in original). However, this literalist interpretation is belied by the concession in *Shearer*, *Thigpen* and *Hughes* that § 2680(h) does not bar the identical claim against the government when the assailant is not an employee. As noted above, it makes no sense to say that negligence claims "arise out of" assault and battery claims only when the assailant happens to be a federal employee, *Bennett*, 803 F.2d at 1504; the derivation of a claim cannot rationally be said to turn on the employment status of the assailant.

Moreover, statutory language "should not be read in isolation from the context of the whole Act," but rather with an eye towards the legislation's "object and policy." Richards v. United States, 369 U.S. 1, 11 (1962). *Accord*, Jayson, § 69. In this case, the legislative goal of providing a uniform system for compensating the victims of government negligence[5] is met only through the approach advocated by plaintiffs. Indeed, both *Hughes* and *Panella* explicitly rejected, as "out of keeping with the rest of the act," a literal interpreation of "arising out of" that would have barred negligence suits where the assailant was not federally employed. *Panella*, 216 F.2d at 624; *Hughes*, 514 F. Supp. at 669 (quoting *Panella*).[6]

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[5] *See* Jayson, §§ 66, 66.03, 69; 69 Geo. L.J. at 812 & n.49.

[6] The Supreme Court, sensitive to Congress' desire to use the FTCA to "mitigate [the] unjust consequences of sovereign immunity," has explicitly rejected, in the FTCA context, the traditional approach of strictly construing statutory waivers of immunity. Jayson, §§ 67, 69 (quoting Feres v. United States, 340 U.S. 135, 139 (1950)). *Accord* 69 Geo. L. J. at 813. *E.g.*, *Kosak*, 465 U.S. at 853 n.9 (rejecting strict construction approach as "unhelpful," and noting that "unduly generous interpretations of the exceptions [to the waiver of sovereign immunity] run the risk of defeating the central purpose of the statute"); Block v. Neal, 460 U.S. 289, 298 (1983) (" 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced' ") (citations omitted). *See* also Kielwien v. United States, 540 F.2d 676, 681 (4 Cir.), *cert. denied*, 429 U.S. 979 (1976) ("The [FTCA] is remedial and should be liberally construed to grant the relief contemplated by Congress"); *Bennett*, 803 F.2d at 1504 ("broad immunity is inconsistent with the primary purpose of the Federal Tort Claims Act, to provide a forum for the resolution of claims against the federal government for injury caused by the government's negligence"). Indeed, the judicial trend in recent years have been toward an expansion of government liability via increasingly liberal interpretations of the FTCA. Note, "From *Feres* to *Stencil*: Should Military Personnel

In addition, while it may make sense to view a claim for negligent supervision as "arising out of" the assault, because the sole basis for this vicarious liability is an employee's assaultive conduct, this cannot be said where the government negligence is a distinct tort, independent of the employment relationship. *See Rogers*, 397 F.2d at 15; *Gibson*, 457 F.2d at 1395; *Loritts*, 489 F. Supp. at 1032. Thus, even under a literal reading of the statute, § 2680(h) would allow a suit where the cause of action is not based on a claim of negligent supervision.[7]

The second criticism of plaintiffs' approach, derived from *Hughes*, *Thigpen* and *Shearer*, concerns the policy goals underlying § 2680(h). Of the three principal objectives motivating creation of the exceptions to the

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Have Access to FTCA Recovery," 7 Mich. L. Rev. 1099, 1101, 1104, 1106 (1979).

Although there are some Fourth Circuit opinions that have adhered to the stricter traditional approach, these cases rely primarily on decisions that either preceded the recent liberalization, or that are outside the unique FTCA context. *See, e.g., Thigpen*, 800 F.2d at 394.

[7] The government also argues, citing *Hughes* and *Shearer*, that a negligence claim should be deemed to "arise out of" an employee's assault when the assault is the "immediate" cause of the injury to plaintiff. However, this standard would mean that a negligence claim based on a non-employee's assault—also the "immediate" cause of injury—would be barred by § 2680(h). Yet the courts have clearly rejected that possibility.

The 'immediacy' of a factor contributing to injury is not the litmus test for causation under basic principles of tort law. Multiple factors, some more immediate than others, can all be legal causes of an injury as long as the intervening events—even where intentional or criminal—are reasonably foreseeable. Rest. (2d) Torts, § 302 A-B (1965); *cited in* Courtney v. Remler, 566 F. Supp. 1225, 1232 (D.S.C. 1983), *aff'd*, 745 F.2d 50 (4 Cir. 1984); 69 Geo. L. J. at 808 & n.34, 825-27. Moreover, this 'immediacy' standard was developed in the context of negligent supervision claims, where it was considered necessary to avoid circumvention of § 2680(h) and the resulting expansion of governmental liability—problems that are solved with the standard advocated by plaintiffs.

FTCA, only the desire to avoid United States "exposure . . . to liability for excessive or fraudulent claims" is implicated by the assault and battery exception of § 2680(h). Kosak v. United States, 465 U.S. 848, 858 (1984). *See* 69 Geo. L.J. at 811 n.46.[8] This objective, however, is easily met by plaintiffs' standard, which ensures the existence of an independent tort as the basis for federal liability. As the Second Circuit recently pointed out, the fear of excessive government liability is relevant in cases where liability is premised solely on the employment relationship; i.e., where, unlike this case, the claim is one for negligent supervision. *See Johnson*, 788 F.2d at 853. Indeed, the thrust of Chief Justice Burger's opinion in *Shearer*, 105 S. Ct. at 3042-43, concerns the problems associated with claims of negligent supervision/respondeat superior—i.e., imposing liability on the government *solely* because of its status as employer. *See Johnson*, 788 F.2d at 850 (describing *Shearer*).[9]

The criteria advocated by plaintiffs cannot legitimately be faulted for failure to provide bright lines for application. Whether there has been a violation of a regulation or statute—negligence *per se*—involves a straightforward inquiry. Whether the government would be liable

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[8] The other two are (1) freeing certain government activities (i.e., those involving the delicate exercise of discretion) from the threat of civil suits, and (2) foreclosing this new federal remedy in cases where adequate relief was already available. *Kosak*, 465 U.S. at 858; 69 Geo. L.J. at 811 n.46.

[9] Even Chief Justice Burger's statement that Congress was concerned with a "certain type of factual situation—deliberate attacks by Government employees," 105 S. Ct. at 3042, must be read in this context. This statement immediately follows the contention that Congress did not distinguish *between* negligent supervision and respondeat superior claims, and it precedes the conclusion that "Congress did not hint that it thought the Government's liability for an assault and battery turned on the adequacy of supervision or warnings." Clearly, the focus is avoidance of vicarious government liability.

had the assailant been a private party also entails a relatively simple assessment. The courts currently have little trouble litigating FTCA cases involving private assailants. All that is required here is a determination of whether there is any legal basis—apart from its status as employer—for finding the government to be negligent.

The government's alternative for determining the applicability of § 2680(h), relying on the employment status of the assailant, would be no easier to apply. To focus on employment status opens the door to a range of arguments concerning the 'scope of employment'—e.g., does a battery committed by an off-duty employee constitute a battery by a government employee for purposes of § 2680(h)?[10] *See* 69 Geo. L. J. at 818-20; Gardner, "The Federal Tort Claims Act," 16 Clearinghouse Rev. 509, 515 (Nov. 1982); Jayson, Chapter 8. The criteria advocated by plaintiffs, by rendering the assailants' employment status irrelevant, will actually avoid this quagmire.[11]

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[10] In fact, under the majority's ruling, the case could well be remanded for examination of this very issue, since the corpsman here was apparently off-duty at the time when he committed the assault. *See Thigpen*, 800 F.2d at 394 n.2 (court's conclusion that claim was barred by assault and battery exception obviated need to examine district court ruling on "scope of employment" requirement of 28 U.S.C. § 1346(b)).

[11] The majority asserts that the rule I would adopt would not eliminate an inquiry into the "scope of employment," but merely shift the inquiry to those employees whose alleged negligence allowed the assault to occur. I respectfully suggest that the majority misconceives the nature of the rule that I propose.

As explained *supra*, I read § 2680(h) to permit suits against the United States, in circumstances where a government employee has committed an assault and battery, whenever plaintiffs can isolate a government duty, and breach of that duty, independent of the government's status as employer. To satisfy this requirement, plaintiffs must establish a failure to perform adequately some duty which the government has either voluntarily assumed or had imposed upon it by legislative or executive order. In other words, plaintiffs must establish that government employees, acting within the scope—indeed obligations—of their employment, would have acted in a manner that could have averted the ensuing assault and battery. There is no place for an inquiry into whether particular negligent employees acted within the scope of their employment; indeed, the very basis of the plaintiff's case is a failure of any government employee so to act. This approach thus avoids the "scope of employment" quagmire which the majority's alternative invites.

Even if the preceding analysis were incorrect, it would be no indictment of the rule that I have proposed. At worst, this rule merely fails to eliminate the type of "scope of employment" inquiry that the majority concedes is necessitated by its approach. Thus, while my proposal may prove no easier to apply, it certainly entails no greater difficulties than the alternative advocated in the majority opinion.

Conclusion

The majority opinion reads the intentional tort exception to the FTCA, § 2680(h), in such a way as to make the employment status of the assailant determinative of when the United States will be liable for its negligent misconduct. The opinion gives short shrift to the factors isolated by plaintiffs for distinguishing this case from our earlier FTCA decisions. In so doing, it reaches a result that comports neither with logic, the statute, nor fundamental notions of equity. I thus respectfully dissent. I would reverse the judgment for defendant and remand the case for trial.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM85-775

MICHAEL N. SHERIDAN and MARY A. SHERIDAN

v.

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

Plaintiffs bring this action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. Secs. 2671-2680, alleging that as a result of the government's negligence, they were shot at and injured by an off-duty Naval medical aide. The government has filed a motion to dismiss on the basis that the cause of plaintiffs' injuries was an intentional tort by a federal employee, and therefore, is explicitly excluded from the FTCA by Sec. 2680(h). Both sides have fully briefed the issue, and the court is now prepared to rule. No hearing is necessary. Local Rule 6.

FACTS

On February 6, 1982, after finishing his shift, United States Navy Medical Aide Robert Carr began drinking, and after allegedly consuming a considerable amount of alcohol, packed some belongings, including a rifle, into a uniform bag and left his quarters. Sometime before 9:00 p.m., three Navy corpsmen discovered Mr. Carr lying face down in a drunken stupor on the floor of the old hospital building at the Naval Medical Center in Bethesda, Maryland. The three corpsmen attempted to take Mr.

Carr to the emergency room of the hospital, but apparently he broke away, grabbing his bag, and revealing the barrel of his rifle. Later that night, Mr. Carr fired several rifle shots at a vehicle occupied by the plaintiffs, injuring them.

Plaintiffs allege that their injuries are due to the government's negligence, and that this negligence was twofold: (1) that the government failed to adequately supervise Mr. Carr, a person it knew or had reason to know was psychologically unstable; and (2) that it failed to enforce its rules and regulations which prohibit the keeping of firearms at the Naval Center.

Legal Analysis

The FTCA sets forth the circumstances under which the United States will waive sovereign immunity and accept liability for the tortious acts of its employees. 28 U.S.C. Sec. 1346(b) grants original jurisdiction over such claims to the United States District Courts. The law of the state in which the alleged tortious act occurred controls the nature of the conduct for which damages may be recovered.

Section 2680 of the Act, however, specifically excludes certain tortious conduct from coverage. Relevant to this case is Sec. 2680(h) which states, in part, that the provisions of the Act shall not apply to ". . . [a]ny claim arising out of assault [or] battery. . ." That is, when a government employee commits an intentional tort, the government does not waive its sovereign immunity.

The defendant argues that the events in this case clearly fall within the exclusion of Sec. 2680(h). Defendant asserts that the plaintiffs have alleged injuries resulting from an assault and battery by a federal employee, and as such, are precluded by Sec. 2680(h) of the Act from recovery against the government.

The plaintiffs concede that the general rule is that the government is not liable for the intentional torts of its employees. Plaintiffs argue, however, that this general rule does not apply here because it is not the intentional tort that caused the plaintiffs injuries, but the *negligence* of the government.

Thus, the question before this court is the scope of Sec. 2680(h), and whether it bars plaintiffs from maintaining this action against the government. "The applicability of Sec. 2680(h) is a threshold question in a suit such as this, and can be determined by the Court as a matter of law." *Hughes v. Sullivan*, 514 F. Supp. 667, 668 (E.D. Va. 1980), *aff'd*, *Hughes v. United States*, 662 F.2d 219 (4th Cir. 1981).

In analyzing the scope of Sec. 2680(h), there are three factual situations that must be distinguished.

The first factual situation is where A, a government employee, gets angry and hits B. If A were not a government employee, B would clearly have no cause of action against the government. However, because A is a government employee, B can sue the government under a theory of *respondeat superior*. Thus, the mere fortuity that A is a government employee gives B an action against the government. To avoid such a result, Sec. 2680(h) was included in the FTCA, specifically exempting the government from liability for the intentional torts of its employees. There is no dispute that this first factual situation falls within the exemption, and indeed, the legislative history of the FTCA indicates that this is exactly the type of situation with which Sec. 2680(h) was intended to deal.

> Congress was advised by the Department of Justice that the exception would apply "where some agent of the Government gets in a fight with some fellow . . . [and] socks him." Tort Claims. Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 33 (1942).

United States v. Shearer, 105 S.Ct. 3039, 3042 (1985).

The second situation is where C, a government employee, is negligent (for example, negligently failing to supervise those confined in a prison), and as a result, A assaults B. Courts have held that B can sue the government under the FTCA—not because of A's intentional act, but because of government employee C's negligence. *See Rogers v. United States*, 397 F.2d 12 (4th Cir. 1968) (Sec. 2680(h) is inapplicable when tortfeasor is not a government employee); *Panella v. United States*, 216 F.2d 622 (2d Cir. 1954) (leading case on the issue).

The third factual situation is the one with which the courts have had difficulty. The facts are the same as in #2, above, except that A happens to be a government employee rather than a private citizen. This is the factual situation of the instant case, and plaintiffs argue that the results should not turn on the mere happenstance that Mr. Carr was a government employee, when the fact of his employment is irrelevant to the plaintiffs' claims.

Courts analyzing this third factual situation have split in their conclusions. Some find that the facts are similar to situation #1, and therefore there is no cause of action against the government. Other courts consider the facts to be much more similar to #2—the plaintiff is not suing the government because of the intentional act of A, a government employee, but rather because of the *negligence* of C (a government employee).

The courts that take the first view—that a cause of action against the government in negligence is barred if the injury is caused by an intentional tort of a government employee—read the language of Sec. 2680(h) broadly. "Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes

any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a battery committed by a Government employee." *United States v. Shearer, supra,* at 3042. *Accord Hughes v. Sullivan,* 514 F. Supp. at 668-69.

These courts say that plaintiffs will not be permitted to circumvent the exclusion of Sec. 2680(h) through artful pleading. They note that, notwithstanding evidence of government negligence, the intentional conduct of the employee is an intervening cause of the plaintiff's injuries and thus, action is barred. (*See, e.g., Naisbitt v. United States,* 611 F.2d 1350 (10th Cir. 1980) (finding the intentional tort to be of such magnitude that, as a matter of law, it constituted an intervening force).

Finding the intentional act of a government employee to be an "intervening cause", however, does not explain why a different rule should result in #2 and #3. It appears more likely that courts are concerned that applying other than absolute rule barring actions whenever a government employee commits an intentional tort, will result in plaintiffs getting around the restrictions of Sec. 2680(h) by alleging some prior negligence by the government. (*See e.g., Naisbitt, supra* at 1355: "[A]n attempt to establish liability on a negligence basis is indeed an effort to circumvent the retention of immunity provided in Sec. 2680(h).")

Other courts have argued that the critical distinction is not between employees and nonemployees, but between on-duty employees and off-duty or nonemployees. They reason that Sec. 2680(h) was to protect the government from liability when a plaintiff had a cause of action against the government *solely* on a *respondeat superior* theory. However, when an employee commits a tort outside the scope of his duties, and for which no *respondeat superior* theory would apply, the plaintiff has no cause of action against the government unless the government has

been negligent in some way. Under these circumstances, the plaintiff's cause of action is not based on the intentional tort but rather on the negligence of the government. [For a detailed and thorough analysis of this position, see *Gale v. United States,* 491 F. Supp. 261 (D. S.C. 1980) (*Gale I*).]

The Third Circuit, using this approach in *Gibson v. United States,* 457 F.2d 1391 (3d Cir. 1972), denied the government's motion for dismissal based on Sec. 2680(h). In *Gibson,* plaintiff was a teacher at a Federal Job Corps Center who was assaulted by an enrollee at the Center. (The court considered the enrollee a federal employee.) The Center was to train dangerous, mentally ill young men who were known to be violent juvenile offenders, and the plaintiff alleged that the government was negligent in failing to take sufficient safety measures. In refusing to find the action barred by Sec. 2680(h), the court said:

> . . . the attack upon Gibson was a foreseeable consequence of the Government's failure to exercise due care *under the circumstances* and, therefore, it *is not such an intervening act as will sever the necessary causal relation between the negligence and the appellant's injuries.*
>
> "Here the very risk which constitutes the defendant's negligence is the probability of such action. It is clear that when such action occurs, it should not insulate the defendant's negligence under the causation formula. In other words, it is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm."
>
> Under the appellant's allegations, the injury arose out of the basic negligence of the United States and the attack was the foreseeable consequence of the original misconduct. "That the foreseeable danger

> was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. *Breach of that duty would be negligence.* . . ." Under such circumstances, the attack was not an intervening act and the tort did not arise out of the assault and battery. It had its roots in the Government's negligence.

457 F.2d at 1395. (Emphasis in original) (citations and footnotes omitted). *See also Shearer v. United States*, 723 F.2d 1002, (E.D. Pa. 198), *reversed and remanded* (on other grounds), 105 S.Ct. 3039 (1985).

The approach taken by the Third Circuit requires the court to look beyond the identity of the intentional tortfeasor, and to focus on the government's behavior to decide whether it was a "cause" of the plaintiff's injury. Clearly an absolute rule has the advantage over the Third Circuit's approach, by being easier to apply, but it can cause illogical results.

For example, as the plaintiffs in this case point out, assuming that there was some negligence on the part of the government, if every other fact in this case was the same except that Mr. Carr was a private citizen instead of a government employee, the plaintiffs would have a cause of action against the government for its negligence. Because Mr. Carr is a government employee, however, the plaintiffs are barred by Sec. 2680(h). The plaintiffs urge the court to avoid this result by applying the reasoning of *Gibson*.

While the court is sympathetic to plaintiffs' request, it finds that it is bound by the Fourth Circuit's decision in *Hughes v. United States, supra*. In *Hughes*, a United States postal employee sexually assaulted a young girl while on a break between his two daily mail delivery routes. He was charged with taking indecent sexual liberties, and pled guilty to a lesser charge. The man continued to work as a mailman, and the father of the

molested child asked the postal supervisor to take the employee off of delivery routes so that he would not come into contact with children. The postal supervisor refused to do so, and subsequently, the mailman lured two girls into his truck while on his delivery route, and sexually molested them. The mother of the two girls sued the United States under the FTCA, claiming that the supervisor had been negligent in keeping the employee on the delivery route after he knew of the first sexual assault, and that the negligence was the proximate cause of the children's injuries.

The United States took the position that the *Hughes'* claim was grounded in the intentional tort of assault and battery and thus, excluded under 28 U.S.C. Sec. 2680 (h). The District Court agreed, holding that the federal government cannot be held liable in negligence for assaults by its employees. The Fourth Circuit affirmed the district court for the reasons stated in the District Court's opinion. The district court explicitly acknowledged that its result was in conflict with the Third Circuit's holding in *Gibson*.

To avoid the result in *Hughes*, the plaintiffs attempt to distinguish the facts in this case from those in *Hughes*. They argue that the assault in *Hughes* could have happened even without the negligence of the government, whereas in this case, "but for" the negligence of the government, Mr. Carr would not have had a gun and therefore could not have shot at the plaintiffs' car. But the court does not find this distinction to be meaningful: the plaintiffs in *Hughes* could have argued that "but for" the government's negligence in leaving the mailman on a delivery route, the assault on the two young girls would not have occurred.

Further support for the proposition that this court is bound in this case by the decision in *Hughes*, is the district court's opinions in *Gale v. United States*, (*Gale I*), 491 F. Supp. 574 (D.S.C. 1980) and *Gale v. United*

States, (*Gale II*), 525 F. Supp. 260 (1981). *Gale* involved the rape of the plaintiff by an off-duty Marine. The plaintiff alleged that the government was negligent in its medical treatment of the Marine and in its military supervision over him. In *Gale I*, the district court denied the government's motion for summary judgment. In a thoughtful opinion in which Judge Hawkins analyzed this problem, he concluded that the plaintiff's cause of action was based on the negligence of the government, and that as such, was not barred by Sec. 2680(h). After *Gale I*, the Fourth Circuit affirmed *Hughes* and when the government sought reconsideration of the denial of its motion, Judge Hawkins reversed his earlier decision and "reluctantly agree[d] that plaintiffs' claims had to be dismissed." The court said that "[t]here is no doubt that the Fourth Circuit in *Hughes* has now accepted the majority rule in refusing to allow an action against the government where the assailant is a government employee." *Gale II* at 261.

For the foregoing reasons, the court finds that plaintiffs' claims, "arising out of" an assault and battery, are barred by Sec. 2680(h).

Plaintiffs also argue that the government's motion to dismiss should be denied because there has been no showing that the firing of the shots that injured the plaintiffs was the result of the intentional tort of assault or battery. Specifically, plaintiffs assert that the medical aide who fired the shots might not have had the mental capacity (given his psychological state), to form the intent necessary to commit assault or battery.

However, assault under Maryland law requires only a general intent to do an act and not a specific intent to cause harm. *McGhee v. State*, 9 Md. App. 526 (1970). Likewise, the "intent to do harm is not essential to a battery. The gist of the action is not hostile intent on the part of the [tortfeasor], but the absence of consent to the contact on the [injured party's] part." *Ghassemieh v.*

Schafer, 52 Md. App. 31, 38 (1982). In addition, the court in *Ghassemieh* considered the argument that the same behavior could support a claim of battery or constitute gross negligence. Although the court agreed that the two were not mutually exclusive, it pointed out that in some areas of the law this was not true, such as actions brought under the FTCA. In such a case, the distinction between negligence and battery is maintained, and intentional conduct will be considered a battery. 52 Md. App. at 42, footnote 4.

For the foregoing reasons, it is this 10th day of December 1985, by the United States District Court for the District of Maryland,

ORDERED:

(1) that defendant's motion to dismiss be, and the same hereby is, *Granted*; and

(2) that the Clerk of the Court mail copies of this Memorandum and Order to the parties.

/s/ Herbert F. Murray
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. HM-85-775

MICHAEL N. SHERIDAN and MARY A. SHERIDAN

vs.

THE UNITED STATES

JUDGMENT

In accordance with the Memorandum and Order dated December 10, 1985 and filed in the above entitled case, it is

ORDERED and ADJUDGED:

1.) that defendant's motion to dismiss be, and the same hereby is "GRANTED".

Dated at Baltimore, Maryland this 10th day of December, 1985.

JOSEPH A. HAAS, Clerk

By: /s/ [Illegible]
Deputy Clerk